

**BEFORE THE TENNESSEE REGULATORY AUTHORITY
NASHVILLE, TENNESSEE**

Re: *Docket to Establish Generic Performance
Measurements, Benchmarks and
Enforcement Mechanisms for BellSouth
Telecommunications, Inc.*

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) Docket No. 01-00193
) EXECUTIVE SECRETARY
)

CLEC RESPONSE IN OPPOSITION TO PETITION FOR STAY

The CLEC Coalition¹ submits the following response in opposition to the Petition for Stay filed by BellSouth Telecommunications, Inc. ("BellSouth") on May 21, 2002.

BellSouth has asked the Tennessee Regulatory Authority ("TRA") to stay the effectiveness of the Order issued May 14, 2002, in the above-captioned proceeding. BellSouth asks that the stay remain in effect pending the resolution of BellSouth's "Motion for Reconsideration" (filed May 29, 2002) and "any ensuing appeals that may be necessary." Petition, at 1.

In considering whether to grant a stay, the TRA must weigh the following factors: (1) the likelihood that BellSouth will prevail on the merits of any appeal of the TRA Order (2) the relative harm to the parties of granting the stay and (3) the public interest. *See* TRA Rule 1220-1-2-.19.

BellSouth's Petition addresses only one of these factors, the issue of whether BellSouth will suffer irreparable harm if the stay is not granted. BellSouth contends that, because it is not possible for the company to comply with the Order within the time frames set

¹ For purposes of this response, the Coalition members include Access Integrated Network, Inc., Birch Telecom, Inc., MCI WorldCom, Inc., AT&T Communications of the South Central States, Inc., and DEICA Communications, Inc. d/b/a Covad Communications Company.

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by the TRA, BellSouth “faces the risk of sanction or penalty” for violating the Order. Citing one case as precedent, BellSouth asserts that it is “axiomatic that a party is irreparably harmed when it faces the risk of sanctions or penalty for the failure to do that which it is unable to do.” Petition, at 3. BellSouth also claims that any effort to comply with the TRA order prior to a ruling on the Motion for Reconsideration “will direct limited resources that should not be wasted.” *Id.*, at 3.

BellSouth offers no other reasons why the stay should be granted. There is no discussion of whether BellSouth is likely to prevail on the merits of any appeal, no discussion of potential harm to other parties, and no discussion of the public interest.

BellSouth’s Petition does not deserve serious consideration. The only basis for the Petition – the claim that BellSouth is unable to comply with the time limits set forth in the Order – should properly be raised (and has been raised) in a Petition for Reconsideration or as a defense should the agency initiate a proceeding to seek sanctions against BellSouth for failure to comply with the Order.

It is difficult to understand how the mere possibility of sanctions at some time in the future could be characterized as “irreparable harm” if the stay is not granted. Moreover, if BellSouth can prove its claims that it is literally impossible to comply with the time limits in the Order, the agency will presumably take that evidence into account in deciding whether sanctions are appropriate. Finally, the one case cited by BellSouth to support its claim that it is “axiomatic” that the possibility of sanctions constitutes “irreparable harm” does not say any such thing. *B.F. Goodrich Tire Co. v. Lyster*, 328 F.2d 411 (5th Cir. 1964) involved a discovery dispute, not a petition for a stay. In that case, the trial judge wrongly imposed sanctions on one party for failure to comply with a discovery order. The case says nothing

about requests for a stay or whether the possibility of sanctions might constitute "irreparable harm" in considering a stay request.

BellSouth's Petition does not begin to demonstrate the showing required to obtain a stay under the TRA's rules. The TRA's Order of May 14, 2002, sets performance measures, benchmarks, and enforcement mechanisms "to ensure that BellSouth provides nondiscriminatory access to its network elements" as required by state and federal law. Order, at 2. Any delay in the implementation of those measures, benchmarks, and enforcement mechanisms will only delay, yet again, the long-promised opening of the local telephone markets and the arrival of true competition for Tennessee consumers. BellSouth's Petition does not even discuss those factors which the agency must weigh in considering the stay request.

BellSouth's claims that it cannot comply with the time limits set forth in the Order are also raised in BellSouth's Petition for Reconsideration (at pp. 19-23). The Intervenor will address those claims in responding to that Petition. For purposes of the Stay Petition, however, the Intervenor would note only that BellSouth's claims in Tennessee are inconsistent with the carrier's recent actions in Florida.

BellSouth states that it would take "approximately three months" to implement new performance measures and enforcement mechanisms in Tennessee as long as "no changes or only minor changes were made in the performance measures proposed by BellSouth." Petition, at 2. Any substantial departure from BellSouth's proposals will require "perhaps a year or longer" to implement. Varner affidavit, footnote 1.

BellSouth proposed that Tennessee adopt the same performance measures and penalties adopted by the Georgia Public Service Commission and, as discussed above, insists that any other plan could take many months, perhaps a year, to implement.

The Florida Public Service Commission, however, ordered BellSouth on February 14, 2002, to adopt a performance measures and penalties plan that is substantially more complex than the Georgia plan and is, in many ways, similar to the TRA's plan. Florida ordered BellSouth to implement the plan by May 14, 2003 – the same ninety day deadline imposed by the TRA for many measures. BellSouth did not seek any additional time and has now presumably complied with the Florida order.² Moreover, BellSouth's claims of impossibility ring hollow considering that the TRA adopted in large part BellSouth's proposed business rules for the measures being implemented and methodology for making compliance determinations for parity measures.

In sum, there are good reasons to be skeptical of BellSouth's claims that it cannot meet each of the time limits in the Order. To the extent those claims do have any merit, the TRA will presumably address them in ruling on BellSouth's Petition to Reconsider and can make any necessary adjustments to the Order at that time. That is no reason, however, to stay the effective date of the entire Order.

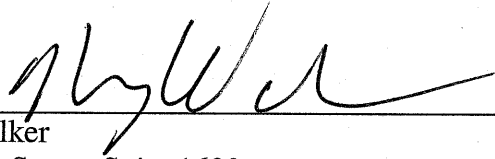
² For example, the Georgia plan has only seven levels of disaggregation for provisioning measures. The Florida plan has twenty-four. BellSouth, however, managed to make the required changes to its systems within ninety days of the Florida decision.

For these reasons, BellSouth's Petition for Stay should be denied.

Respectfully submitted,

BOULT, CUMMINGS, CONNERS & BERRY, PLC

By: _____

A handwritten signature in dark ink, appearing to read 'H Walker', is written over a horizontal line.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded via facsimile or hand delivery, to the following on this the 31th day of May, 2002.

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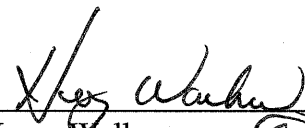
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